Docket 95-92 ORIGINAL

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

OCT - 2 1989

In the Matter of:	)	
	)	
Request Of A.C. Nielsen Co. for Permissive Use of Line 22 of the Active Portion of the Television Video Signal	)	DA 89-1060

To: The Commission

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REPLY COMMENTS OF
A.C. NIELSEN COMPANY

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Dated: October 2, 1989

TABLE OF CONTENTS

SUMMARY.....i

I. INTRODUCTION.....1

II. THE FCC SHOULD CONTINUE ITS RELIANCE UPON THE MARKETPLACE -- NOT PROTECTIVE REGULATION -- TO PROMOTE THE EFFICIENT USE OF THE BROADCAST SPECTRUM.....5

III. THE PROPER LEGAL STANDARD TO BE APPLIED TO NIELSEN'S REQUEST IS WELL-ESTABLISHED AND MAY NOT BE DISREGARDED OF CHANGED BECAUSE OF COMMENTS BY NIELSEN'S COMPETITORS....9

IV. IF THE MARKETPLACE DO DICTATES, NIELSEN AND OTHERS CAN "CO-EXIST" ON LINE 20

SUMMARY

The controversy surrounding Nielsen's proposed use of line 22 has been created and cultivated by Nielsen's competitors -- principally Airtrax -- solely in an effort to block Nielsen from participating in the marketplace. These parties have even gone so far as to misstate certain salient facts to the Commission -- such as they are not competitors or that they are developing "new" technology (technology that Nielsen has used for over 15 years) -- and have seized upon the issuance of the Public Notice in this proceeding to request the Commission to apply to Nielsen's Request criteria far beyond those applied to these parties' own requests, all of which were expeditiously granted.

The Commission must not treat Nielsen differently than those companies that have already received authorizations to use line 22. Nielsen has met the criteria that were applied to these parties in all respects, and as a technological matter, Nielsen's use of line 22 will in no manner "preempt" or inhibit any other authorized use of that line. The Commission should leave to the marketplace the decision of which competing services should be provided over line 22.

Finally, the syndicated programming industry has made it clear that it is economically important to it for Nielsen to have the ability to utilize line 22. Without such authority being granted expeditiously, the industry will be harmed and disadvantaged.

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A.C. Nielsen Company ("Nielsen"), by its attorneys, hereby provides its "Reply Comments" on the issues raised in the Commission's Public Notice, DA 89-1060, released September 1, 1989 (the "Public Notice") and to the Comments filed in this proceeding on September 22, 1989:

I. INTRODUCTION

1. This proceeding involves an effort by Nielsen's competitors and potential competitors to cause the Commission to engage in an unwarranted and harmful departure from its specifically applicable precedents and general policies. These efforts are aimed at blocking Nielsen's access to line 22 for

anticompetitive purposes, and are based almost entirely upon the false impressions -- cultivated by these competitors -- that the granting of Nielsen's Request would preempt other worthwhile, "high technology" uses of Line 22. As is set forth in detail below, this is not the case. While the marketplace will decide which service should service should be provide through line 22, it is clear that Nielsen's use of line 22 will not technologically "preempt" others' from participating in that market.

2. Before responding to the various substantive comments that have been made with respect to Nielsen's Request, Nielsen is constrained to point out that Airtrax, the party most responsible for creating the controversy surrounding Nielsen's Request, has recklessly, if not willfully, created a largely erroneous account of the commercial realities that lie behind its attack on what was, and should be treated as, a routine application. The Commission's appreciation of this fact is important in its consideration of Airtrax's opposition to Nielsen's Request.[1/]

3. Initially, it must be understood that Airtrax is a competitor of Nielsen's in the market to provide program and

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[1/]Airtrax's attack has even gone so far as to delay the issuance to Nielsen of Special Temporary Authority that, if it had been granted in a timely fashion, would have provided further evidence disproving many of the insupportable speculations set forth in Airtrax's Comments.

commercial verification services. Airtrax has blatantly misrepresented that such is not the case. See Airtrax's Comments at 13. Specifically, Airtrax has from its inception actively marketed a program verification service and specifically refers to (and denigrates) Nielsen's AMOL system in its comparative marketing information. Attached hereto as Exhibit A is an Airtrax marketing letter from Mr. Arnold Dubin dated January 20, 1989, in which he specifically states that:

> Airtrax provides verification of any broadcast of an encoded commercial or program . . .

Exhibit A at 9.

> AirTrax has been designed to meet the needs of Syndicators . . . .
>
> One of the major differences between AirTrax and the A.C. Nielsen AMOL system, is that Airtrax has been granted FCC approval to use the first line of the active video where the AMOL code is recorded in the vertical blanking interval. As Airtrax is on line 22 of the active video, the Airtrax Code is not subject to normal station broadcasting equipment processing which can interrupt the AMOL coding system . . . .
>
> Though final pricing has not been set, . . . [higher charges will be imposed upon barter (vs. cash) shows] . . . due to clearance information on the commercials as well as the shows.[2/]

[2/]Notwithstanding Airtrax's implications otherwise, Airtrax must encode entire programs, not just commercial advertisements, in order to provide the self-contained commercial verification service it has proposed. One of the features Airtrax proposes to offer as part of its commercial verification service is the ability to verify whether a specific commercial was incorporated into its intended barter syndicated program. It would be impossible for Airtrax to provide this feature unless the program, as well as the advertisement, were encoded by Airtrax. Otherwise, Airtrax would "read" the code encoded onto the commercial and know the commercial was broadcast, but would not

Exhibit A at 1 (emphasis added).

4. These statements show irrefutably that Airtrax is in fact, a competitor of Nielsen's (and has misrepresented that it is not), and reveal that Airtrax has knowingly and wrongly challenged Nielsen's representation that "normal station operations" inhibit Nielsen's reliance on line 20 to obtain line-up information. They also reveal that Airtrax's true purpose in instigating this proceeding is to preempt competition from Nielsen. Airtrax's own marketing material principally promotes its service on the basis that Airtrax -- and not Nielsen -- has received line 22 authority. Its own Comments blatantly proclaim its desire to have the Commission "institute formal rulemaking proceedings for the purpose of reserving...Line 22 for commercial advertisement identification and verification services, such as those offered by Airtrax...." Airtrax Comments at 22.[3/]

5. A second Airtrax-induced misconception about Nielsen's

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know whether the associated program was broadcast as well.

Actual experience verifies that Airtrax has misstated its non-competitive standing. Specifically, Nielsen has learned that Airtrax is now encoding entire programs for King World Productions. Knowledge that Airtrax and Nielsen are competitors -- and that Airtrax has misstated the fact otherwise -- are important to the Commission's consideration because it establishes Airtrax's anti-competitive purpose in opposing Nielsen's Request.

[3/]It should also be noted in this regard that, based upon current knowledge, Airtrax is involved only in testing -- not commercially offering -- its service in only a few markets.

request is that the SID code-based verifications services proposed by Airtrax and VidCode are "new" or involve "novel technology." This claim is false. Airtrax's and VidCode's proposed services are nothing more than replications of a concept and technology invented by Nielsen. Airtrax has itself acknowledged that it was Nielsen that first developed the idea -- and technology to implement -- the encoding of SID codes onto lines in the video signal for the purpose of providing verification services. See Airtrax Comments at 1. Nielsen first proposed this concept and technology to the Commission in 1974 in connection with the networks' request for authority to encode line 20 of the VBI to obtain program line-up information. Airtrax's and VidCode's "new" ideas or technology are nothing more than versions of the concept and technology that Nielsen developed.[4/]

[4/]Airtrax's Comments contain so many factual errors as to take it beyond the bounds of legally protected advocacy. The Noerr-Pennington doctrine protects only legitimate petitioning of a governmental agency. Subversion of the integrity of the governmental process by misstatement and lack of candor cannot be tolerated and therefore is not to be accorded the protection of the First Amendment. See Israel v Baxter Laboratory, 466 F.2d 272, 278 (D.C. Cir. 1972). Indeed, in a decision highly relevant to the Commission, the court in the AT&T divestiture case held that a baseless claim to the FCC by AT&T could form the basis for a monopolization charge against the defendant. United States v. AT&T, 524 F. Supp. 1331, 1361-64, (D.D.C. 1981). Whether the baseless claims contained in Airtrax's various statements to the Commission in this matter rise to the level of an independent antitrust violation, of course, is not the issue to be decided in this forum at this time. But the Commission should not reward Airtrax' tactics by further delaying Nielsen's ability to provide a service much demanded by the marketplace.

II. THE FCC SHOULD CONTINUE ITS RELIANCE UPON THE MARKETPLACE -- NOT PROTECTIVE REGULATION -- TO PROMOTE THE EFFICIENT USE OF THE BROADCAST SPECTRUM

6. Nielsen in its Request seeks only to have the Commission adhere to its longstanding and well-established policy of allowing the marketplace to ensure efficient use of the spectrum and technological innovation in the provision of communications services. The Commission should not allow Nielsen's competitors -- actual or potential -- improperly to manipulate the regulatory process to prevent competition from Nielsen or other future entrants.

7. The comments from actual or potential competitors say nothing more than that Nielsen should be handicapped through the mechanism of having the Commission, rather than the marketplace, decide how the technical and economic issues are to be resolved. This requested governmental intrusion into the marketplace apparently results from Nielsen's success in offering its ratings services and the importance of those service to the entire broadcast industry.[5/] These comments offer neither factual evidence nor theoretical coherence; what they do offer is a disastrous public policy prescription that will harm not only Nielsen but, more importantly, the broadcast industry and the

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[5/] If Airtrax or other Nielsen competitors believe, as they have vaguely intimated, that Nielsen has violated the antitrust laws, their recourse is to other forums, not to the FCC.

public.

8. The government's interfering to the economic marketplace to the disadvantage of an efficient firm virtually always results in a net loss to consumer welfare. Legal and economic scholars such as Judges Bork[6/] and Posner[7/] have long advocated this proposition, and it has come to be accepted in our economic jurisprudence. See, e.g., Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 276 (2d Cir. 1979). The Commission, too, has adopted this principle; it is the very essence of deregulation.

9. Viewed slightly differently, the comments filed by Nielsen's competitors are an attempt to induce the Commission to adopt some sort of "industrial policy" aimed at determining which technological solution should succeed in the competitive arena. Given the importance of accurate and timely ratings to the programming industry and of that industry to our international competitiveness,[8/] the program and commercial verification business seems a very unattractive candidate for experimentation with industrial policy. But, in any event, whatever one might think of industrial policy in the abstract, our society has thus

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[6/] Bork, The Antitrust Paradox, 178-194 (1978).

[7/] Olympia Equip. Leasing v. Western Union Tel. Co., 797 F2d 370 (7th Cir. 1986).

[8/] See, e.g., Remarks of Chairman Sikes before the International Radio and Television Society (September 27, 1989) 5, 8. (U.S. programming and film industry returns $2.5 billion annual surplus; $800 million from TV show licensing alone).

far opted for the marketplace solution to resolve such issues. It would be a public policy decision of the strangest sort to displace this approach by a selection process enforced by government fiat, which, however well intentioned, must of necessity be substantially arbitrary.

10. Regulatory interference with the market decision-making process is precisely what the FCC has worked so hard to eliminate in recent years. Commission decisions have consistently embodied the agency's reluctance to influence or inhibit technological innovation. For instance, the Commission has sought to reduce its technical requirements in order to "stimulate technological innovation in communications and to create, to the maximum extent possible, an unregulated competitive marketplace environment for the development of communications." A Re-Examination of Technical Regulations, 99 F.C.C.2d 903, 911 (1984). When the Commission refused to develop a "Master Plan" to guide land mobile services to more spectrum-efficient technologies, it cited similar concerns: "The Commission believes that the industry should take the initiative to develop and introduce more spectrum-efficient technology; thus, government intervention should not direct this process." Amendment of Parts 22, 90 and 95 of the Commission's Rules to Require Conversion to More Spectrum-Conservative Technologies, FCC No. 85-186 (rel. Apr. 19,

1985).[9/]

11. In all of these cases, the Commission has firmly established its objectives and left to the marketplace the manner in which those objectives are to be achieved. Whatever uses are to be made of line 22, and the technology to be used which will meet the Commission's objectives of maintaining licensee discretion and protecting against degradation of broadcast services, should be worked out in the marketplace. The Commission's policy to date -- authorizing broadcast-related uses of Line 22 consistent with the technical integrity of the television picture and relying upon marketplace forces to choose among users and suppliers -- should remain the norm.

III. THE PROPER LEGAL STANDARD TO BE APPLIED TO NIELSEN'S REQUEST IS WELL-ESTABLISHED AND MAY NOT BE DISREGARDED OR CHANGED BECAUSE OF COMMENTS BY NIELSEN'S COMPETITORS

12. Some of Nielsen's present or potential competitors appear to request the Commission improperly to impose upon Nielsen legal burdens that were not imposed upon them when they sought (and obtained) authority to use line 22 for the purpose of transmitting SID codes. For example, while VidCode itself was

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[9/] In this request, it appears that Airtrax could make a more efficient use of line 22. See Note [24]. See also Comments of A.C.Nielsen Company, DA89-1060, at 16-17; Inquiry into the Scrambling of Satellite Television Signals and Access to Those Signals by Owners of Home Satellite Dish Antennas, Report, 2 FCC Rcd. 1669, 1676 (1987); Second Report, 3 FCC Rcd. 1200, 1204 (1988); AM Stereophonic Broadcasting, 3 FCC Rcd. 403, 404 (1988).

not subject to this requirement, it repeats the already-rejected claim that Nielsen should have to show that "it is infeasible to transmit AMOL signals by means other than line 22," Vidcode Comments at 6.[10/] Similarly, the Arbitron Company, under the obvious misconception that Nielsen's use of line 22 will preclude others' use of that line, seeks to have the Commission require requests for permissive authority to be subject to full comparative hearings. Comments of the Arbitron Company ("Arbitron Comments") at 4. Arbitron even goes so far as to ask the Commission to require Nielsen to share with Arbitron -- apparently at no cost and for any purpose Arbitron sees fit -- the SID transmission data gathered by Nielsen at significant expense and effort, and through Nielsen's patented and proprietary technology. Arbitron Comments at 4.

13. Some commentators have even seized upon the issuance of the Public Notice to ask that the Commission readdress issues and claims rejected by it long ago. For example, Arbitron casually rejects the Commission's often-repeated determination that SID code transmissions are "broadcast related," instead labeling them, without support or citation, "private carriage" signals.

[10/]VidCode's "Comments" are nothing more than a restatement of the claims made in Airtrax's "Opposition" filed on August 8, 1989. Nielsen responded to Airtrax's claims in its "Reply" filed on August 21, 1989, and Airtrax's claims were effectively rejected by the Commission in its Public Notice. Rather than simply restate Nielsen's responses to these unoriginal and insupportable claims, Nielsen simply refers VidCode to Nielsen's "Reply" to Airtrax's Opposition.

Arbitron Comments at 5. Similarly, PBS and NAB apparently seek to have the Commission reconsider all grants of line 22 authority on the basis that it may be possible that future developments in television receivers could render SID codes transmission visible on line 22. Comments of the National Association of Broadcasters ("NAB Comments") at 6-7; Comments of the Public Broadcasting Service ("PBS Comments") at 2.

14. While each of these contentions is addressed in turn below, the Commission should avoid any temptation to undertake a re-evaluation of previously-settled issues, or to apply to Nielsen's Request criteria different from, or in addition to, the criteria that has applied to all other similar requests. It is well-established requirement of due process and administrative law that similarly-situated entities must be treated by an agency in a similar manner. See Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965); Greyhound Corp. v. ICC, 551 F.2d 414, 418 (D.C. Cir. 1977) (per curiam); Garrett v. FCC, 513 F.2d 1056, 1060 (D.C. Cir. 1975); Columbia Broadcasting System, Inc. v. FCC, 454 F.2d 1018, 1026 (D.C. Cir. 1971). The Commission must treat Nielsen the same as its competitors that have already been authorized to use line 22 unless it clearly enumerates material, factual differences between Nielsen and those companies, and establishes the relevance of any such differences to the purposes of the Communications Act. Melody Music, Inc. v. FCC, supra, at 733; see also Public Media Center v. FCC, 587 F.2d 1322, 1331

(D.C. Cir. 1978); Burinskas v. NLRB, 357 F.2d 822, 827 and n.5 (D.C. Cir. 1966). There are no such relevant factual differences in this case.[11/]

15. As noted in Nielsen's earlier comments and prior authorizations to use line 22, the legal standard properly applicable to Nielsen would require it to provide a showing that:

> -- the use of the Line be "broadcast related;" i.e., that the transmissions to be made on line 22 constitute "special signals;"
>
> - broadcast service not be interfered with or degraded by the proposed use of Line 22;
>
> - broadcast licensees will retain their discretion to decline to broadcast the specified codes on Line 22; and
>
> -- the data to be transmitted relates to the program material within which it is transmitted and to the operation of a television station's primary program service.[12/]

[11/]One example of unequal treatment that Nielsen fears it has endured in this case resides in the fact that it was verbally informed by a Commission staff member that this proceeding had been designated "restricted" under the ex parte rules, but no public notice to that effect has yet been issued. This is particularly troubling in the present context where, it appears, other parties have undertaken or solicited substantial extra-record communications with the Commission.

[12/]See e.g., Letter to Burton Greenburg, counsel for TeleScan, Inc. from James C. McKinney, Chief, Mass Media Bureau, dated July 18, 1985; Letter to Erwin C. Krasnow, counsel for Ad Audit Inc. from James C. McKinney, Chief, Mass Media Bureau, dated July 18, 1985; Letter to John G. Johnson, Jr., counsel for Republic Properties, Inc. from James C. McKinney, Chief, Mass Media Bureau, dated November 6, 1986; Letter to Schuyler M. Moore, counsel for Republic Properties from William E. Johnson, Acting Chief, Mass Media Bureau dated August 28, 1987; Letter to Kevin McMahon, counsel for VidCode, from Alex D. Felker, Chief, Mass Media Bureau, dated October 27, 1988.

16. In this case, the Commission already has determined that Nielsen has met and satisfied each and every one of these criteria. Specifically, in the Public Notice, the Commission stated that:

> ....(1) the Nielsen AMOL system should qualify as a "special signal;" (2) its use will enhance broadcast operation, and (3) the AMOL is compatible with technical standards for television service and will not produce unacceptable interference with, or degradation of, television service received by viewers. Nielsen states that consistent with Commission policy governing similar requests, television licensees will retain ultimate control over their transmissions and will not be required to transmit the AMOL signals. For these reasons, the Commission believes that it should grant approval for television licensees to use line 22 to transmit Nielsen's AMOL system.

17. Not a single comment filed in this proceeding has provided or even implied the existence of any evidence whatsoever that the Commission's tentative determinations are incorrect. For example, no commentator has claimed that the AMOL transmission will interfere with or degrade current television service. While certain broadcasting interests have used Nielsen's Request as an opportunity to urge the Commission to limit the use of line 22 to broadcast services, see NAB Comments at 9, PBS Comments at 4, the Commission has repeatedly determined in prior line 22 authorizations that the services proposed by Nielsen for line 22 are broadcast-related, and are of great importance to the industry generally. Nearly twenty years ago, the Commission recognized that the rating services are "important ... to many entities involved in producing the program which [a]

station broadcasts, and without which its viable operation ... would be impossible." Coded Information in TV Broadcasts, 18 R.R.2d 1776, 1787 (1970); see also Comments of A.C. Nielsen at 4-5. Moreover, the imposition by the Commission of a "broadcast-service" limitation on the uses to be made of the spectrum would be contrary to the Commission's policy of facilitating and relying upon competition to achieve the public interest. The Commission has historically sought to extract more value from the spectrum for the benefit of consumers by permitting the introduction of new technology. See Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television, 71 F.C.C.2d 632, 640 (1979).[13/]

18. PBS and NAB have expressed concerns that there may be future developments in television receivers that will reduce overscanning, and thus render SID codes visible on line 22. NAB

[13/] A granting of Nielsen's Request will simply represent another instance of the Commission's permitting the full utilization of regulated facilities, one posing far less societal risk than the Commission has assumed heretofore. See, e.g., Second Computer Inquiry, Final Decision, 77 F.C.C.2d 384, modified on reconsideration, 84 F.C.C.2d 50 (1980), further modified on reconsideration, 88 F.C.C.2d 512 (1981), aff'd sub nom. Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 198 (D.C.Cir. 1982), cert. den., 461 U.S. 938 (1983); Third Computer Inquiry, Report and Order, 104 F.C.C.2d 958 (1986)(Phase I Order), modified on reconsideration, 2 FCC Rcd. 3035 (1987), further reconsideration, 3 FCC Rcd. 1135 (1988), second further reconsideration, FCC 89-226 (rel. Aug. 1, 1989), appeals pending sub nom. California v. FCC, No. 87-7230 (9th Cir.) (pet. for rev. filed May 28, 1987) and sub nom. Illinois Bell Telephone Co. v. FCC, No. 88-1364 (D.C.Cir.)(pet. for rev. filed May 16, 1988).

Comments at 6-7; PBS Comments at 2. However, the restrictions contained in current authorizations are more than adequate to protect against possible future degradation about which PBS and NAB have expressed concern. As stated above, all line 22 authorizations incorporate the restriction that the authorized transmissions may not interfere with or degrade television service. Thus, if developments in receiver design cause the SID Code transmission to begin to become visible to the public, the current authorizations already take that eventuality into account.

19. Similarly, while both Airtrax and VidCode repeated their totally speculative and unsupported accusations that Nielsen could somehow be able to force production houses to encode, or licensees to broadcast AMOL Codes on line 22, Airtrax Comments at 14, VidCode Comments at 6, factual experience and simple logic reveal these claims to be insupportable.[14/] As to the syndicators, it is at <u>their request</u>, not Nielsen's, that

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[14/]Airtrax's claims in this regard are based upon its false statement that "Nielsen refus[es] to accept program broadcast verifications data supplied by any other service other than AMOL." Airtrax Comments at note 6, 15. Nielsen currently relies upon a variety of sources for "line-up" data, including the syndicators themselves and "TV DATA," a service provided by Scripps-Howard. The fact that the AMOL system would provide far more accurate line-up data that either of these sources, and thus would result in far more reliable ratings of syndicated programming, cannot be used as a basis for denying to Nielsen the opportunity to use that system on line 22. Other alternative furture sources of line-up information would similarly be evaluated by Nielsen after becoming commercially available.

Nielsen is seeking authority to transmit SID Codes on line 22 because those transmissions are needed to provide more reliable ratings to the syndicated programming industry. In any case, because advertisers and their agencies are the sources of the syndicator's revenues and profits, it is apparent that the syndicators would readily respond to any request by those entities to encode Airtrax or other codes on any material. Thus, the marketplace is fully capable of protecting Airtrax's service, if it is desired by that very same marketplace.[15/]

20. With respect to the licensees, Airtrax's contentions are, again, entirely speculative and contrary to established fact.[16/] Indeed, Nielsen has adopted and implemented the "in-station" method of code detection precisely to meet the demands of stations that choose voluntarily to delete the AMOL codes

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[15/]For this reason, even if Airtrax's and Nielsen's verifications services were "complementary" and not competitive, as suggested by Airtrax, the marketplace would be fully capable of assuring Airtrax's ability to provide its service to the extent that service is in demand. See 31, infra.

[16/]Airtrax's baseless and self-serving statements, made upon its claimed but undisclosed "information and belief," that Telescan and Ad Audit desired to use line 22 because line 20 was fully occupied by Nielsen's SID Codes transmission, Airtrax Comments at 10, are entirely speculative and irrelevant. The decision to broadcast material on either line 20 or 22 is and was up to the respective broadcasters, not Nielsen, and Nielsen has implemented the "in-station" method of code detection precisely to meet the demands of licensees' declining to broadcast AMOL codes.

prior to their being broadcast.[17/] After almost 15 years of AMOL code transmission, Nielsen is not aware of -- and neither Airtrax nor Vidcode have referred to -- a single instance where a licensee has voiced concern that its discretion to refuse to broadcast those codes has been restricted in any way. As with virtually all of Airtrax's contentions, these speculations by Nielsen's competitors are simply "red herrings," designed to generate concerns where none are warranted. In any case, the Commission has already determined to address claims that licensee discretion will be infringed in this area only when such claims are made with support.[18/]

[17/] Contrary to the gross misstatement by Airtrax, Airtrax Comments at 19, the "in-station" method of code detection is used for stations that voluntarily strip Nielsen's AMOL codes as they are being broadcast. This decoding method offers absolutely no capability to detect or reinsert codes that are involuntarily stripped by the recording, editing or play-back equipment used by many stations.

[18/]When granting broadcasters the right to broadcast Nielsen's SID codes on line 20, the Commission noted that some parties:

> fear that the networks will force licensees to transmit the SID signals .... As for the licensees' fear of network pressure to carry the SID signal, we observe that licensees are required to retain ultimate control over the content of their transmissions, including radiated VBI signals. Hence, any attempt to interfere with a licensee's discretion to control the overall nature of its service offering if it occurred, might constitute a matter warranting appropriate corrective action by the Commission.

Radio Broadcasting Services; Transmission of Program Related Signals in the Vertical Blanking Interval of the Standard Television Signal, 46 Fed. Reg. 40024, August 6, 1981.

21. The application to Nielsen's Request of criteria that have not been applied to others would be similarly unwarranted. For example, VidCode's request that Nielsen establish the impossibility of using other alternatives was made by Airtrax in its August 8, 1989 Opposition, and subsequently rejected by the Commission in its Public Notice, but in any case has been met by Nielsen to the degree it is appropriate to consider. There are no other lines available for use in the Vertical Blanking Interval, and Nielsen and the syndicated programming industry have established the inability to use line 20 to provide AMOL service in connection with the ratings of syndicated programming.[19/]

22. Airtrax's claims that Nielsen's problems in using line 20 may not be as severe as Nielsen has indicated because Nielsen enjoys a "75% success rate" with regard to the acceptance of its ratings by syndicators. Airtrax Comments at 19. This claim so misreads the source of that claim (a letter to the Commission from Paramount, see Airtrax Comments at 18) as to go beyond the boundaries of fair advocacy or even common sense. It is patent that the 75% rate referred to by Paramount, Airtrax's Comments at 18, referred to the fact that information resulting from the AMOL editing/decoding process in connection with syndicated barter

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[19/]Airtrax itself has acknowledged the limitations applicable to the use of line 20 to provide line-up information for syndicated programming. See text supra at Para. 4 and Exhibit A.

programming is, at most, 75% reliable; whereas the equivalent information from AMOL encoded network programs is about 96% reliable.[20/] These percentage figures have absolutely nothing to do with the degree of "acceptance" of Nielsen's ratings in the syndicated programming industry.

23. Airtrax similarly is off-base in claiming that the problems that require Nielsen to use line 22 -- automatic stripping of all information on that line by the editing and playback equipment used in most stations today, see Nielsen's Comments at 9-10 -- might be solved by placing more decoders in the respective television markets or using the "in-station" method of decoding. Airtrax Comments at 19. As with virtually every other instance where Airtrax has attempted to describe Nielsen's business, these self-serving claims are totally incorrect. The stripping problem arises exactly because the stripping occurs prior to the time that the codes would be sensed by decoders, whether the decoders would be located in the station or in the community, and regardless of the number of the decoders. Thus, Airtrax's proposed solutions would have no effect upon the problems that require Nielsen to use line 22.

24. It is equally clear that use of other lines in the

[20/] In fact, based upon most recent information, the range of reliability of AMOL - generated data in connection with syndicated barter programs is between 11%-64%, whereas the industry requires a reliability factor in excess of 95%.

active video picture would raise significant concerns in the broadcast industry, see PBS Comments at 2-3, NAB Comments at 9.[21/] Finally, notwithstanding the misunderstanding reflected in Arbitron's Comments, Nielsen's AMOL system would be the most efficient user of Line 22. Whereas Airtrax's Code requires the use of both fields in line 22, Nielsen's AMOL codes will only use one field of that line. (Arbitron's Comments reversed the relative efficiencies of Airtrax's and Nielsen's encoding systems in this regard.)[22/]

[21/]In addition, use of line 23 may not result in ratings of sufficient reliability for the industry. Unlike Airtrax's proposed decoders -- which scan all lines around lines 22 and 23 -- Nielsen's decoders, according to their specifications, are designed to scan only up to line 23. Because Nielsen may require a one line margin-of-error to provide line-up data of sufficient reliability to be used in the preparation of ratings, Nielsen's use of line 23 could require a redesign and modification of its decoders to allow them to scan beyond line 23. The expense and delay Nielsen would incur in modifying its decoders in this manner would likely be far greater than would be incurred by Airtrax or VidCode were they to use line 23 instead of line 22, because Airtrax's decoders already have the capability to scan lines beyond line 23 and because, based upon currently available information, neither Airtrax nor VidCode have equipment commercially operating in television markets at the present time.

[22/]Arbitron's suggestion that full comparative hearings be held to decide among "competing" demands for authority to use line 22 is completely unfounded because it is based upon the false impression that Nielsen's use of line 22 would be mutually exclusive with use by others. See Arbitron Comments at 4. As set forth in the text, infra, Nielsen's use of Line 22 will not preempt use by others and thus the complexities, delays, expense and other complications arising from adoption of Arbitron's suggestion need not be incurred by the Commission and others. Moreover, even is such technologically peremption did occur, longstanding Commission policy recognizes that the market will select the use of highest economic value at the time.

25. In short, it is clear that Nielsen's request complies in all respects with the requirements imposed by the Commission upon similar applications that have been granted. In these circumstances, it would be unfair, unwarranted and improper for the Commission to apply different criteria to, or to deny, Nielsen's Request.

IV. IF THE MARKETPLACE SO DICTATES, NIELSEN AND OTHERS CAN "CO-EXIST" ON LINE 22.

26. The syndication industry clearly stated in its comments its strong interest in having Nielsen's Request to use line 22 granted immediately. Other commentators have expressed the desire that neither advertising nor program verification services be preempted by regulatory fiat from using line 22 if those services are demanded by the market.

27. As stated in Nielsen's Comments, it should be left to the marketplace to decide how best to achieve this goal. The consumer welfare implications of a Commission-specified "technical fix" in the name of co-existence on line 22 could have equal or even greater adverse affects on the public interest than would follow from implementing Airtrax's proposal to prevent Nielsen from using line 22. The reason is plain: prescription of the method of co-existence inevitably would be static. It would reflect the Commission's estimate of the state of technology and of market demand at the time of the prescription. Two problems

inevitably arise from this reality: First, and by far the more serious, technology and demand are dynamic. Today's engineering solution, raised to the status of law, can become tomorrow's drag on technological and economic progress. The Commission recognizes this, and thus it attempts to avoid excessive specificity in meeting its regulatory obligations, even in an inherently technical field such as radio frequency uses.[23/] Second, the Commission may be wrong in its assessment of technical capability and market demand. If it is, the imposition of unnecessary social losses will not await tomorrow; it will occur today.

28. Unfortunately, many commentators labor under the Airtrax-induced misconception that such co-existence is technologically impossible.[24/] **But the fact is that such co-**

[23/] See, e.g., Amendment of Parts 2 and 22 of the Commission's rules to Permit Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Radio Telecommunications Service, 3 FCC Rcd. 7033 (1988).

[24/]These misconceptions are apparent in, for example, the letter from the American Association of Advertising Agencies to the Commission, which was misinformed that Nielsen's Request sought a "reconsideration" of Airtrax's authorization rather than an authorization for Nielsen itself; the letters from E&J Gallo Wineries, which, after first supporting Nielsen's request, later withdrew that support after being falsely informed that "it is not technically possible for Nielsen and the current user of line 22 to both encode on that line;" and the letters from the Procter and Gamble Company, which, after first expressing unwarranted concern that the grant of Nielsen's request might "restrict the range of services utilizing line 22," later correctly expressed its understanding that "line 22 can technically be used by one service without foreclosing it to another service."